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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/920,323	08/02/2001	Joshua J.D. Martin	088305-0135	4997

7590

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EXAMINER
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FISCHER, ANDREW J

ART UNIT	PAPER NUMBER
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3627

DATE MAILED: 08/24/2005

Please find below and/or attached an Office communication concerning this application or proceeding.

# Office Action Summary

Application No.

09/920,323

Applicant(s)

MARTIN ET AL.

Examiner

Andrew J. Fischer

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --  
Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

## Status

- 1) ☒ Responsive to communication(s) filed on 08 June 2005.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

## Disposition of Claims

- 4) ☒ Claim(s) 1-6, 11-16, 21 and 24-26 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-6, 11-16, 21 and 24-26 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

## Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

## Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
  - ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

## Attachment(s)

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)  
Paper No(s)/Mail Date \_\_\_\_\_
- 4) ☐ Interview Summary (PTO-413)  
Paper No(s)/Mail Date. \_\_\_\_\_
- 5) ☐ Notice of Informal Patent Application (PTO-152)
- 6) ☐ Other: \_\_\_\_\_

## **DETAILED ACTION**

### ***Continued Examination Under 37 C.F.R. §1.114***

1. A request for continued examination (“RCE”) under 37 C.F.R. §1.114, including the fee set forth in 37 C.F.R. §1.17(e), was filed in this application on June 8, 2005. This application was under a final rejection (the “First Final Office Action” mailed February 18, 2005) and is therefore eligible for continued examination under 37 C.F.R. §1.114. Because the fee set forth in 37 C.F.R. §1.17(e) has been timely paid, the finality in the previous First Final Office Action has been withdrawn pursuant to 37 C.F.R. §1.114.

### ***Acknowledgements***

2. In accordance with the RCE noted above, Applicants’ amendment filed June 8, 2005 is acknowledged. Accordingly, claims 1-6, 11-16, 21, and 24-26 remain pending.

3. All references in this Office Action to the capitalized versions of “Applicants” refers specifically the Applicants of record. References to lower case versions of “applicant” or “applicants” refers to any or all patent “applicants.” Unless expressly noted otherwise, references to “Examiner” in this Office Action refers to the Examiner of record while reference to or use of the lower case version of “examiner” or “examiners” refers to examiner(s) generally.

4. This Office Action is written in OACS. Because of this, the Examiner is unable to control formatting, paragraph numbering, font, spelling, line spacing, and/or other word processing issues. The Examiner sincerely apologies for these errors.

***Claim Rejections - 35 USC § 101***

5. 35 U.S.C. §101 reads as follows:

Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of this title.

6. Claim 21 and 26 are rejected under 35 U.S.C. §101 because the claimed invention is directed to non-statutory subject matter. The basis of this rejection is set forth in a two-prong test:

- (1) The invention must be within the technological arts; and
- (2) The invention must produce a useful, concrete, and tangible result.

7. Prong (1) requires the claimed invention to be within the technological arts. See *In re Musgrave*, 431 F.2d 882, 167 USPQ 280, 289-90 (C.C.P.A. 1970); and *In re Johnston*, 502 F.2d 765, 183 USPQ 172, 177 (C.C.P.A. 1974). Mere abstract ideas (*i.e.*, laws of nature, natural phenomena) that do not apply, involve, use, or advance the technological arts fail to promote the “progress of science and the useful arts”<sup>1</sup> and are therefore non-statutory subject matter.<sup>2</sup>

8. The Examiner recommends (by way of example only) positive recitation of a computer or other technology within the body of the claim if the specification supports such an amendment.

***Claim Rejections - 35 USC §112 2<sup>nd</sup> Paragraph***

9. The following is a quotation of the 2<sup>nd</sup> paragraph of 35 U.S.C. §112:

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<sup>1</sup> It is the Examiner’s position that “technological arts” is synonymous with “useful arts” as stated in the U.S. Constitution, Art. I, §8. See *In re Waldbaum*, 457 F.2d 997, 173 USPQ 430, 434 (C.C.P.A. 1972).

<sup>2</sup> *E.g.*, the physical sciences are statutory; *c.f.*, social sciences which are non-statutory

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The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

10. Claims 24-26 are rejected under 35 U.S.C. §112, 2<sup>nd</sup> paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

a. Claims 24-26 are indefinite because it is not known how the parameter can be “bidding options” if the parameter expressly excludes “bid information” as recited in claim their respective parent claim(s).

### ***Claim Rejections - 35 USC §103***

11. The following is a quotation of 35 U.S.C. §103(a) which forms the basis for all obviousness rejections set forth in this Office Action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

12. Claims 1-6, 11-16, 21, and 24-26 are rejected under 35 U.S.C. §103(a) as being unpatentable over Grey et. al. (U.S. 2002/0120552) (“Grey”). Grey discloses the claimed invention including determining whether an auction parameter has changed. Grey does not directly disclose automatically refreshing a representation of the auction at a browser precisely as claimed.

However if not inherent, it would have been obvious to a person having ordinary skill in the art at the time the invention was made to modify Grey to include automatically refreshing a representation of the auction at a browser. Such a modification would have allowed the user to instantly view changing auction circumstances.

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13. The conditional limitations in claims 1 and 21 (e.g. claim 1 recites “if it is determined that the sponsor determined auction parameter has been changed”) have been considered by the Examiner. However, the language is not being given patentable weight. Applicants are reminded that “Language that suggests or makes optional but does not require steps to be performed or does not limit a claim to a particular structure does not limit the scope of a claim or claim limitation. [Emphasis in original.]” MPEP §2106 II C.

14. Because Applicants have not objectively indicated and redefined claim limitation(s) to have meanings other than their ordinary and accustomed meanings, the Examiner again concludes that Applicants have decided not to be their own lexicographer. To support this position, the Examiner relies on the following factual findings. First and as noted in the previous Office Action,<sup>3</sup> the Examiner has carefully reviewed the specification and prosecution history and can not locate any lexicographic definition(s). Second, the Examiner finds that not only have Applicants not pointed to definitional statements in their specification or prosecution history, Applicants have also not pointed to a term or terms in a claim with which to draw in those statements<sup>4</sup> with the required clarity, deliberateness, and precision.<sup>5</sup> Third, after receiving

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<sup>3</sup> See the “First Non Final Office Action” mailed May 7, 2004, Paragraph No. 15; and the First Final Office Action, paragraph No. 13.

<sup>4</sup> “In order to overcome this heavy presumption in favor of the ordinary meaning of claim language, it is clear that a party wishing to use statements in the written description to confine or otherwise affect a patent’s scope must, *at the very least*, point to a term or terms in the claim with which to draw in those statements. [Emphasis added.]” *Johnson Worldwide Assocs. v. Zebco Corp.*, 175 F.3d 985, 989, 50 USPQ2d 1607, 1610 (Fed. Cir. 1999).

<sup>5</sup> “The patentee’s lexicography must, of course, appear ‘with reasonable clarity, deliberateness, and precision’ before it can affect the claim.” *Renishaw PLC v. Marposs Societa’ per Azioni*, 158 F.3d 1243, 1249, 48 USPQ2d 1117, 1121 (Fed. Cir. 1998) citing *In re Paulsen*, 30 F.3d 1475, 1480, 31 USPQ2d 1671, 1674 (Fed. Cir. 1994).

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express notice in the previous Office Action of the Examiner's position that lexicography is not invoked,<sup>6</sup> Applicants have not pointed out the "supposed errors" in the Examiner's position regarding lexicography invocation in accordance with 37 C.F.R. §1.111(b) (i.e. Applicants have not argued lexicography is invoked). Finally and to be sure of Applicants' intent, the Examiner also notes that Applicants have declined the Examiner's express invitation<sup>7</sup> to be their own lexicographer. <sup>8</sup> It remains the Examiner's position that these requirements were reasonable.<sup>9</sup> Accordingly and for due process purposes, the Examiner gives notice that for the remainder of the examination process (and unless expressly noted otherwise by the Examiner), the heavy presumption in favor of the ordinary and accustomed meaning is not overcome; the claims therefore continue to be interpreted with their "broadest reasonable interpretation . . . ." *In re*

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<sup>6</sup> See again the First Final Office Action, paragraph no. 13.

<sup>7</sup> *Id.*

<sup>8</sup> See *e.g. Fuji Photo Film Co. v. ITC*, 386 F.3d 1095, 72 USPQ2d 1769, 1773 (Fed. Cir. 2004) (noting that applicants' failure to correct the examiner's characterization of an element of claim interpretation is nevertheless an indication of how a claim should be interpreted since applicant declined the examiner's express invitation to correct a possible error in claim interpretation: "applicant's attention was called to the examiner's interpretation of [how the element was interpreted by the examiner, and] applicant was invited to correct the examiner's interpretation—an invitation the applicant did not accept.").

<sup>9</sup> The Examiner's requirements on this matter were reasonable on at least two separate and independent grounds. First, the Examiner's requirements were simply an express request for clarification of how Applicants intend their claims to be interpreted so that lexicography (or even an *attempt* at lexicography) by Applicants was not inadvertently overlooked by the Examiner. Second, the requirements were reasonable in view of the USPTO's goals of compact prosecution, productivity with particular emphasis on reductions in both pendency and cycle time, and other goals as outlined in the USPTO's The 21<sup>st</sup> Century Strategic Plan, February 3, 2003 available at [www.uspto.gov/web/offices/com/strat21/index.htm](http://www.uspto.gov/web/offices/com/strat21/index.htm) (last accessed August 21, 2005).

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*Morris*, 127 F.3d 1048, 1054, 44 USPQ2d 1023, 1027 (Fed. Cir. 1997).<sup>10</sup> The Examiner now relies heavily and extensively on this interpretation.<sup>11</sup> Unless expressly noted otherwise by the Examiner, the preceding claim interpretation principles in this paragraph apply to all examined claims currently pending.

15. Under the broadest reasonable interpretation standard noted above and unless expressly modified in this Office Action, the Examiner maintains his interpretations including the statements and/or definitions of claim limitations as noted in the previous Office Action. Those previous definitions are part of the administrative record and, in accordance with *In re Morris*, are provided simply as a factual source to support the Examiner's claim interpretations (and ultimately the Board of Patent Appeals and Interferences claim interpretations if necessary<sup>12</sup>) during ex parte examination.

16. The Examiner maintains his position regarding functional language. As noted in Paragraph Nos. 15 and 16 in the First Final Office Action. In particular, functional recitation(s) using the word "for" or other functional terms (*e.g.* "for determining if an indicator has been

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<sup>10</sup> See also *In re Bass*, 314 F.3d 575, 577, 65 USPQ2d 1156, 1158 (Fed. Cir. 2002) ("In examining a patent claim, the PTO must apply the broadest reasonable meaning to the claim language, taking into account any definitions presented in the specification. Words in a claim are to be given their ordinary and accustomed meaning unless the inventor chose to be his own lexicographer in the specification") (citations omitted); *In re Etter*, 756 F.2d 852, 858, 225 USPQ 1, 5 (Fed. Cir. 1985) (en banc); and MPEP §§ 2111 and 2111.01.

<sup>11</sup> See 37 C.F.R. §1.104(c)(3) which states in part: "the examiner may rely upon admissions by applicant . . . as to *any matter* affecting patentability . . . . [Emphasis added.]"

<sup>12</sup> See *Gechter v. Davidson*, 116 F.3d 1454, 1460, 43 USPQ2d 1030, 1035 (Fed. Cir. 1997) ("[W]e hold that the Board is required to set forth in its opinions specific findings of fact and conclusions of law adequate to form a basis for our review.").



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sent” as recited in claim 13) have been considered but given less patentable weight<sup>13</sup> because they fail to add any steps and are thereby regarded as intended use language. A recitation of the intended use of the claimed invention must result in additional steps. See *Bristol-Myers Squibb Co. v. Ben Venue Laboratories, Inc.*, 246 F.3d 1368, 1375-76, 58 USPQ2d 1508, 1513 (Fed. Cir. 2001) (Where the language in a method claim states only a purpose and intended result, the expression does not result in a manipulative difference in the steps of the claim.).

### *Response to Arguments*

17. Regarding Applicants’ discussion of functional language, Applicants’ response is acknowledged. However a careful review of the language will reveal that the Examiner has *never made a “rejection” based upon functional language*. The Examiner agrees that functional language is acceptable. To be especially clear, providing actual notice of how an examiner interprets a claim *is not a rejection* nor even an objection for that matter.

18. It is the Examiner’s position that there is nothing special about computer implemented inventions. Additionally the Examiner agrees with Applicants’ statement regarding ‘functional descriptive material.’ However, if Applicants believe that computer implemented inventions are in some way “special” and/or are outside the scope of the statutes, case law, rules, or other authorities, Applicants are requested to provide authority for their position.

19. Applicants’ response that “code for” statements do not invoke 35 U.S.C. §112 6<sup>th</sup> paragraph is acknowledged and noted for the record.

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<sup>13</sup> See *e.g. In re Gulack*, 703 F.2d 1381, 217 USPQ 401, 404 (Fed. Cir. 1983)(stating that although all limitations must be considered, not all limitations are entitled to patentable weight).

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20. Applicants response with respect to *In re Morris* is also acknowledged. While the Examiner agrees that after issuance, the specification remains relevant to interpreting the claims from the perspective of one of ordinary skill in the art, this is *not* the method of claim interpretation during ex parte examination. To be clear, this different method of interpreting the claims is not optional:

[T]he Board is *required* to use a different standard for construing claims than that used by district courts. We have held that it is *error for the Board to apply the mode of claim interpretation that is used by courts in litigation*, when interpreting the claims of issued patents in connection with determinations of infringement and validity. Instead, as we explained above, the PTO is obligated to give claims their broadest reasonable interpretation during examination. [Emphasis added.]” *In re American Academy of Science Tech Center*, 367 F.3d 1359, 1369, 70 USPQ2d 1827, 1834 (Fed. Cir. 2004).

21. During ex parte examination on the other hand, the specification can be used to interpret the claims only when attempting to use either lexicography and/or 35 U.S.C. § 112 6<sup>th</sup> paragraph. In fact, the Federal Circuit has warned the USPTO about improperly reading the specification into the claims:

“Nevertheless, this court counsels the PTO to avoid the temptation to limit broad claim terms solely on the basis of specification passages. Absent claim language carrying a narrow meaning, the PTO should only limit the claim based on the specification or prosecution history when those sources expressly disclaim the broader definition . . . .” *In re Bigio*, 381 F.3d 1320, 1325, 72 USPQ2d 1209, 1211 (Fed. Cir. 2004)(citations omitted).

22. Finally and if there is any doubt, the Examiner notes that the MPEP also supports the Examiner’s position that *only* lexicography or 35 U.S.C. 112 6<sup>th</sup> paragraph are available during ex parte examination to incorporate the specification into the claims. MPEP §2111.01<sup>14</sup> begins:

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<sup>14</sup> MPEP §2111.01, 8<sup>th</sup> Edition, Rev 2, May 2004.

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While the claims of issued patents are interpreted in light of the specification, prosecution history, prior art and other claims, this is *not the mode* of claim interpretation to be applied during examination. . . . It is *only when* the specification provides definitions for terms appearing in the claims that the specification can be used in interpreting claim language [*i.e. CCS Fitness Factor 1: Lexicography*]. . . . There is one exception, and that is when an element is claimed using language falling under the scope of 35 U.S.C. 112, 6th paragraph (often broadly referred to as means or step plus function language) [*i.e. CCS Fitness Factor 4*]. In that case, the specification must be consulted to determine the structure, material, or acts corresponding to the function recited in the claim. [Italics added. Underline in original. Citations omitted.]

23. Thus the MPEP clearly states that during ex parte examination, the specification can be used to interpret the claims “only when” attempting to use either lexicography and/or 35 U.S.C. §112 6<sup>th</sup> paragraph. Because “[t]he business of the PTO is patentability, not infringement,” *In re Hogan*, 559 F.2d 595, 607, 194 USPQ 527, 538 (CCPA 1977), the Examiner makes no findings as to how the claims should be interpreted after issuance.

24. Applicants’ arguments with respect to the pending claims and the prior art have been considered but are moot in view of the new ground(s) of rejection.

### ***Conclusion***

25. References considered pertinent to Applicants’ disclosure are listed on form PTO-892. All references listed on form PTO-892 are cited in their entirety.

26. The following two (2) citations to the Manual of Patent Examining Procedure (“MPEP”) apply to this Office Action: MPEP citations to Chapters 100, 200, 500, 600, 700, 1000, 1100, 1300, 1400, 1500, 1700, 1800, 2000, 2100, 2200, 2500, 2600, and 2700 are from the MPEP 8<sup>th</sup> Edition, Rev. 2, May 2004. All remaining MPEP citations are from MPEP 8<sup>th</sup> Edition, August 2001.

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27. Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).
28. Applicants are reminded that patents are written by and for skilled artisans. See *Vivid Technologies, Inc. v. American Science and Engineering, Inc.*, 200 F.3d 795, 804, 53 USPQ2d 1289, 1295 (Fed. Cir. 1999) (“patents are written by and for skilled artisans”). The Examiner therefore starts with the presumption that Applicants are skilled artisans who possess at least ordinary skill in the art. Consequently, it is the Examiner’s position that because the patent references of record are directed to those with ordinary skill in this art, these references are clear, explicit, and specific as to what they teach. Nevertheless some applicants apparently have difficulty understanding the references. In an effort to maintain compact prosecution, provide due process, and to help these applicants understand the contents of a reference when viewed from the position of one of ordinary skill in this art, Applicants are hereby given actual notice that if after reasonably reading any reference of record, if Applicants can not reasonably understand or if Applicants have difficulty comprehending one or more sentence(s), statement(s), diagram(s), or principle(s) set forth in one or more of the reference(s) of record, Applicants should (in their next appropriately filed response) bring this issue to the attention of the Examiner. In addition to bringing this issue to the attention of the Examiner, and in accordance with 37 C.F.R. §1.111(b), Applicants response must also state *why* they either do not understand

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or have difficulty comprehending the reference. If after properly receiving (*i.e.* Applicants' response is made of record) both Applicant's request for understanding and the reasons as to *why* the request is made—and assuming the reference is germane to at least one outstanding rejection—the Examiner may either provide a substitute reference, or alternatively, do his best to elucidate the particular sentence(s), statement(s), diagram(s), or principles(s) at issue in a reasonable manner.

29. Also in accordance with *In re Lee*, 277 F.3d 1338, 1344-45, 61 USPQ2d 1430, 1434-35 (Fed. Cir. 2002), the Examiner finds that Nathan J. Muller's Desktop Encyclopedia of the Internet, ("Desktop Encyclopedia") is additional evidence of what is basic knowledge or common sense to one of ordinary skill in this art. Muller's Desktop Encyclopedia is a practical reference that clearly explains Internet services, applications, protocols, access methods, development tools, administration and management, standards, and regulations. Because of the reference's basic content (which is self-evident upon examination of the reference) and after further review of the entire record including the prior art now of record in conjunction with the factors as discussed in MPEP §2141.03 (where practical), the Examiner finds that the Desktop Encyclopedia is primarily directed towards those of low skill in this art. Because the reference is directed towards those of low skill in this art, the Examiner finds that one of ordinary skill in this art must—at the very least—be aware of and understand the knowledge and information contained within the Desktop Encyclopedia.

30. In accordance with the USPTO's goals of customer service, compact prosecution, and reduction of cycle time, the Examiner has made every effort to clarify his position regarding claim interpretation and any rejections or objections in this application. Furthermore, the

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Examiner has again provided Applicants with notice—for due process purposes—of his position regarding his factual determinations and legal conclusions. The Examiner notes and thanks Applicants for their “Remarks” (beginning on page 6) traversing the Examiner’s positions on various points. If Applicants disagree with any additional factual determination or legal conclusion made by the Examiner in this Office Action whether expressly stated or implied,<sup>15</sup> the Examiner respectfully reminds Applicants to properly traverse the Examiner’s position(s) in accordance with 37 C.F.R. §1.111(b) in their next properly filed response. By addressing these issues now, matters where the Examiner and Applicants agree can be eliminated allowing the Examiner and Applicants to focus on areas of disagreement (if any) with the goal towards allowance in the shortest possible time. If Applicants have any questions regarding the Examiner’s positions or have other questions regarding this communication or even previous communications, Applicants are strongly encouraged to contact Examiner Andrew J. Fischer whose telephone number is (571) 272-6779. If attempts to reach the Examiner by telephone are unsuccessful, the Examiner’s immediate supervisor, Alexander Kalinowski, can be reached at (571) 272-6771. The fax number for facsimile responses is now (571) 273-8300.



Andrew J. Fischer  
Primary Examiner  
Art Unit 3627

AJF  
August 21, 2005

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<sup>15</sup> *E.g.*, if the Examiner rejected a claim under §103 with two references, although not directly stated, it is the Examiner’s implied position that the references are analogous art.